Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

(2)

No. 98-2000

In the Supreme Court of the United States

DANIEL F. POTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether police officers had reasonable suspicion to detain petitioner for investigation after stopping his car for traffic violations.

2. Whether the evidence at trial of petitioner's marijuana trafficking constructively amended the indictment's charge of a cocaine trafficking conspiracy.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Florida v. *Royer*, 460 U.S. 491 (1983)	11, 12, 16
Jones v. *United States*, 119 S. Ct. 2090 (1999)	18
Karnes v. *Skrutski*, 62 F.3d 485 (3d Cir. 1995)	15
Knowles v. *Iowa*, 119 S. Ct. 484 (1999)	11
Ohio v. *Robinette*, 519 U.S. 33 (1996)	8
Ornelas v. *United States*, 517 U.S. 690 (1996)	9, 13
Reid v. *Georgia*, 448 U.S. 438 (1980)	11, 12
Schmuck v. *United States*, 489 U.S. 705 (1989)	17
Stirone v. *United States*, 361 U.S. 212 (1960)	17
Terry v. *Ohio*, 392 U.S. 1 (1968)	10, 11, 12, 13
United States v. *Barahona*, 990 F.2d 412 (8th Cir. 1993)	10
United States v. *Bloom*, 975 F.2d 1447 (10th Cir. 1992)	16
United States v. *Cortez*, 449 U.S. 411 (1981)	10
United States v. *Fernandez*, 18 F.3d 874 (7th Cir. 1996)	15, 16
United States v. *Finke*, 85 F.3d 855 (1st Cir. 1996)	9
United States v. *Glenn*, 828 F.2d 855 (1st Cir. 1987)	18
United States v. *Gonzalez-Lerma*, 14 F.3d 1479 (10th Cir.), cert. denied, 511 U.S. 1095 (1994)	13
United States v. *Hernandez*, 93 F.3d 1493 (10th Cir. 1996)	9

Cases—Continued: Page

United States v. *Johnson*, 934 F.2d 936 (8th Cir. 1991) 18
United States v. *McRae*, 81 F.3d 1528 (10th Cir. 1996) 9
United States v. *Milan-Diaz*, 975 F.2d 720 (10th Cir. 1992) 16
United States v. *Mitchell*, 64 F.3d 1105 (7th Cir. 1995), cert. denied, 517 U.S. 1158 (1996) 17
United States v. *O'Connor*, 737 F.2d 814 (9th Cir. 1984), cert. denied, 469 U.S. 1218 (1985) 18
United States v. *Peters*, 10 F.3d 1517 (10th Cir. 1993) 15-16
United States v. *Place*, 462 U.S. 696 (1983) 10
United States v. *Pruitt*, 174 F.3d 1215 (11th Cir. 1999) 14
United States v. *Roberson*, 6 F.3d 1088 (5th Cir. 1993), cert. denied, 510 U.S. 1204 (1994) 9
United States v. *Robinson*, 414 U.S. 218 (1973) 11
United States v. *Rodriquez*, 976 F.2d 592 (1992), amended, 997 F.2d 1306 (9th Cir. 1993) 17
United States v. *Rodriquex-Sanchez*, 23 F.3d 1488 (9th Cir. 1994) 16
United States v. *Sharpe*, 470 U.S. 675 (1985) 11
United States v. *Sokolow*, 490 U.S. 1 (1989) 10, 16
United States v. *Sullivan*, 138 F.3d 126 (4th Cir. 1998) 9
United States v. *Walker*, 933 F.2d 812 (10th Cir. 1991), cert. denied, 502 U.S. 1093 (1992) 15
United States v. *White*, 81 F.3d 775 (8th Cir.), cert. denied, 519 U.S. 1011 (1996) 9
United States v. *Withers*, 972 F.2d 837 (7th Cir. 1992) 11
United States v. *Wood*, 106 F.3d 942 (10th Cir. 1997) 16
Whren v. *United States*, 517 U.S. 806 (1996) 8

Constitution, statutes, and rule:

U.S. Const. Amend. IV	4, 6, 7, 8, 10, 11
18 U.S.C. 1952(a)	2, 4
21 U.S.C. 846	2, 4
6th Cir. R. 206(a)	8

In the Supreme Court of the United States

No. 98-2000

DANIEL F. POTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-41) is unpublished, but the decision is noted at 173 F.3d 430 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1999. A petition for rehearing was denied on March 18, 1999 (Pet. App. 73-74). The petition for a writ of certiorari was filed on June 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was

convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and interstate travel in furtherance of a cocaine distribution conspiracy, in violation of 18 U.S.C. 1952(a). He was sentenced to 87 months' imprisonment to be followed by four years' supervised release. The court of appeals affirmed. Pet. App. 1-41.

1. On July 15, 1992, at 5:09 p.m., Officers Brent Chamblee and Scott Thompson of the Sulphur, Louisiana, Police Department stopped petitioner's silver Mercedes-Benz automobile on an interstate highway for speeding and changing lanes without signaling. At Officer Chamblee's request, petitioner stepped out of the car and displayed his driver's license. Officer Chamblee advised petitioner that he had committed two traffic offenses. Pet. App. 3; Gov't C.A. Br. 2.

Officer Chamblee asked petitioner where he was going. Petitioner replied, "Houston." Officer Chamblee asked petitioner why he was going to Houston, and petitioner replied that he was going there to do "land, oil and gas work." Officer Chamblee asked petitioner how long he would be in Houston, and petitioner replied that he would be there about ten days. Officer Chamblee asked petitioner whether he had any business cards, and petitioner, after some hesitation, said that he did not. Officer Chamblee noticed that petitioner, who had originally appeared calm, became nervous when asked about his business, as reflected in his body language and his voice inflection. Officer Chamblee also began to suspect that petitioner was fabricating his answers about his business. Pet. App. 4, 12-13, 45-46.

Officer Chamblee then asked petitioner where he was going to work in Houston. Petitioner said that he was working for some people in Tennessee who wanted a partner in Houston. Officer Chamblee considered that answer to be evasive and unresponsive to his question.

Officer Chamblee asked petitioner where he had come from, and petitioner replied that he had spent the previous night in Chattanooga, Tennessee. Pet. App. 13, 46.

Officer Chamblee checked the car's registration, which showed that the car was registered to petitioner. Officer Chamblee then asked petitioner whether he was carrying anything illegal in the car. Petitioner replied that he was not. Officer Chamblee asked for permission to search the car, but petitioner refused. Pet. App. 13.

About four minutes after petitioner's car was stopped, Officer Chamblee called to request a criminal history check on petitioner and a canine unit. About four minutes later, Officer Chamblee received the criminal history report, which showed that petitioner had been arrested on a marijuana charge in 1975. At the same time, the canine unit arrived. About three minutes after that, or 11 minutes after the inception of the traffic stop, the drug-sniffing dog indicated the presence of drugs in petitioner's car. Pet. App. 4, 13.

Officers Chamblee and Thompson searched petitioner's car and found $121,000 in cash, a small quantity of marijuana, and an address book that contained the name of Inman Ray McAndrew, a drug dealer. The officers arrested petitioner and impounded the car. The following day, Officer Chamblee searched the car more thoroughly, discovering a secret compartment that was the size and shape needed to transport kilograms of cocaine. Pet. App. 4-5.

Two days after the arrest, Officer Chamblee issued a traffic citation to petitioner for speeding and changing lanes without signaling. The State of Louisiana subsequently forfeited petitioner's car. Pet. App. 5.

2. In 1995, a federal grand jury indicted petitioner, along with McAndrew and ten other individuals, in

connection with a cocaine trafficking conspiracy than spanned some 12 years. Petitioner was charged with intent to distribute cocaine, in violation of 21 U.S.C. 846, and traveling in interstate commerce for the purpose of furthering the conspiracy, in violation of 18 U.S.C. 1952(a).

a. Petitioner moved to suppress the evidence obtained as a result of the stop and subsequent search of his car in Sulphur, Louisiana. He contended, among other things, that the police officers violated his Fourth Amendment rights when they detained him until the canine unit arrived. Pet. App. 2, 5.

The magistrate judge recommended that the motion be denied. Pet. App. 42-69. After concluding that the stop of petitioner's car was permissible because the officers had probable cause to believe that petitioner had committed traffic offenses (*id.* at 57- 58), the magistrate judge concluded that the officers had not unreasonably detained petitioner pending the arrival of the canine unit (*id.* at 59-67). The magistrate judge explained that petitioner's detention during the "brief period" between the officer's stop of his car and the drug dog's alerting on the car "did not exceed the scope of the original traffic stop" (*id.* at 64), noting that "[t]he purposes of the original traffic stop (*i.e.*, to cite [petitioner] for the two traffic [violations] or possibly to issue him a warning) most likely could not have been completed during this short period of time" (*id.* at 66). The magistrate judge also explained that, in any event, the officers developed reasonable suspicion early in the traffic stop, based on petitioner's "nervousness and the way he answered Officer Chamblee's questions," to justify detaining petitioner until the drug-sniffing dog arrived. *Id.* at 64-65. The magistrate judge credited Officer Chamblee's testimony concerning petitioner's

nervousness when asked about his business and his hesitant and unresponsive answers (*id.* at 64), observing that "[s]ome weight must be given to the instincts of a trained police officer" in assessing whether an individual's conduct warrants suspicion (*id.* at 65).

The district court, after de novo review, accepted the magistrate's recommendation that petitioner's motion to suppress be denied. The court found that "the detention of [petitioner] while the drug dog was summoned was only for a very short period of time and was reasonable under the circumstances." Pet. App. 71.

b. The evidence at trial established that petitioner and co-defendant McAndrew, who pleaded guilty and testified for the government, jointly trafficked in cocaine and marijuana during the 1980s in Knoxville, Tennessee. In September 1984, for example, McAndrew gave petitioner two kilograms of cocaine on credit, in the expectation that the two would share the proceeds from the sale of the cocaine. Also in late 1984, McAndrew, who was about to be incarcerated on a drug conviction, introduced petitioner to Mark Roberts, another drug dealer, so that petitioner would have an alternate purchaser for his cocaine. During the next several years, petitioner regularly sold cocaine to Roberts for resale. In addition, petitioner visited McAndrew in prison, where the two discussed future drug deals. After McAndrew's release in 1991, petitioner regularly supplied McAndrew with cocaine and marijuana from petitioner's source in Texas. On occasion, McAndrew would send a courier to Texas to purchase drugs directly from petitioner. Pet. App. 6-7; Gov't C.A. Br. 5-8.

At the close of the government's case, petitioner moved for a judgment of acquittal. He argued, among other things, that a fatal variance existed between the

indictment and the government's evidence at trial, because the indictment alleged a cocaine trafficking conspiracy but the evidence related to his marijuana trafficking as well as to his cocaine trafficking. The district court denied the motion. At petitioner's request, however, the court instructed the jury that the defendants were not charged with any marijuana trafficking offense, and that the evidence concerning marijuana was being admitted only because "it will make better sense to you all about what was going on." Gov't C.A. Br. 4, 24.

The jury found petitioner guilty of both of the crimes with which he was charged. Pet. App. 7; Gov't C.A. Br. 4.

3. A divided panel of the Sixth Circuit affirmed. Pet. App. 1-41.

First, the court held that the traffic stop and subsequent detention of petitioner did not violate the Fourth Amendment. Pet. App. 7-14. The court rejected petitioner's contention that the officers exceeded the scope of the traffic stop by asking the origin, destination, and purpose of his travel. The court explained that "[i]t is well established that an officer is free to ask traffic-related questions, and questions about a driver's identity, business and his travel plans during the course of a traffic stop." Pet. App. 10, 11.

The court also rejected petitioner's contention that Officer Chamblee impermissibly extended the duration of the traffic stop by requesting a criminal history check and a drug-sniffing dog. Pet. App. 11. By that time, the court explained, Officer Chamblee had already developed "the necessary reasonable articulable suspicion to justify a further detention" of petitioner, because petitioner had "answered his questions evasively, appeared nervous, and appeared to be making up his

answers to questions." *Ibid.* The court added that, although "[a]n officer could not build reasonable articulable suspicion on any one of these factors alone," "[c]ollectively, * * * they suffice." *Ibid.* The court also observed that Officer Chamblee "was still authorized to detain [petitioner] when he called dispatch for these additional investigatory measures," because Officer Chamblee had not yet completed the process of issuing citations to petitioner for his traffic offenses. *Id.* at 13.

Second, the court held that the evidence at trial did not constructively amend the indictment by showing that petitioner trafficked in marijuana as well as cocaine. Pet. App. 23-26. The court explained that evidence of other, uncharged crimes is admissible where, as here, it is so "inextricably intertwined" with evidence of the charged crime that "the evidence of the two could not be presented separately." *Id.* at 23, 25. The court noted that petitioner's and McAndrew's "conversations about marijuana often occurred simultaneous to their discussions about cocaine," with the two men "switch[ing] back and forth discussing both marijuana and cocaine deals." *Id.* at 25. The court also noted that there was ample evidence to link petitioner to the cocaine conspiracy, such as McAndrew's testimony that, although petitioner "mainly dealt marijuana," petitioner also "provided [McAndrew] with cocaine when McAndrew could not rely on his main supplier." *Ibid.*; see also *id.* at 21 (identifying "the substantial evidence establishing that [petitioner] played a key role in the cocaine conspiracy ring").

Judge Gibson, sitting by designation, dissented on the question whether petitioner's detention pending the criminal history check and the arrival of the drug-sniffing dog violated the Fourth Amendment. Pet.

App. 35-41. Judge Gibson agreed that the majority had applied the proper legal standard in resolving that question: whether the officers had "at least 'reasonable suspicion' that [petitioner] had taken part in further criminal activity" in order to detain him "beyond the point at which his traffic violations were resolved." *Id.* at 37. But Judge Gibson disagreed that the standard was satisfied on the facts of this case. Judge Gibson reasoned that petitioner's nervousness and "slightly imprecise responses" were insufficient to give Officer Chamblee reasonable suspicion that petitioner was engaged in criminal activity. *Id.* at 39-40.

ARGUMENT

1. Petitioner principally contends (Pet. 9-23) that the police officers violated the Fourth Amendment by extending the stop of his car for traffic offenses in order to investigate whether he had committed other offenses. That claim does not warrant review. The court of appeals' disposition of the Fourth Amendment question is correct and consistent with the decisions of this Court and other courts of appeals. The unpublished opinion in this case does not purport to articulate any new rule of law, see 6th Cir. R. 206(a) (an opinion should be published if it "establishes a new rule of law" or "alters or modifies an existing rule of law"), but instead involves simply the application of settled legal principles to the unique facts of this case.

a. A police officer may stop a vehicle if he has probable cause to believe that the motorist has committed a traffic offense. The officer's subjective motivations in making the stop are irrelevant. See, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); *Whren* v. *United States*, 517 U.S. 806, 813 (1996). It is within the proper scope of a traffic stop for an officer to demand the motorist's li-

cense and registration and to question the motorist about his itinerary. See, *e.g.*, *United States* v. *Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996) ("questions about [a motorist's] destination and his relationship to his passengers * * * may be asked as a matter of course without exceeding the proper scope of a traffic stop"); *United States* v. *White*, 81 F.3d 775, 778 (8th Cir.) ("a reasonable investigation during a traffic stop may include asking for the driver's license and registration * * * and asking the driver about his destination and purpose") (internal quotation marks omitted), cert. denied, 519 U.S. 1011 (1996); *United States* v. *Roberson*, 6 F.3d 1088, 1092-1093 (5th Cir. 1993) (recognizing that officers may engage during a traffic stop in "routine" questioning concerning, for example, "the ownership of the vehicle" and "the occupants' point of departure"), cert. denied, 510 U.S. 1204 (1994). In addition, the officer may run a computer check, including a criminal history search, so long as the check does not unduly prolong the detention. See, *e.g.*, *United States* v. *Finke*, 85 F.3d 1275, 1279-1280 (7th Cir. 1996); *United States* v. *McRae*, 81 F.3d 1528, 1535-1536 n.6 (10th Cir. 1996); *White*, 81 F.3d at 778.

Once a police officer has completed his investigation and citation of the traffic offense that gave rise to the stop, the motorist must be permitted to leave, unless the officer has by that time developed reasonable suspicion that the motorist has committed or is committing another offense. See *United States* v. *Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998); *McRae*, 81 F.3d at 1535. A reasonable suspicion to continue to detain a motorist requires a "particularized and objective basis for suspecting the person stopped of criminal activity," *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) (internal quotation marks omitted), in addition to the

original traffic offense. It is based on all of the circumstances known to the officer, and it credits the officer's inferences and deductions. See *United States* v. *Sokolow*, 490 U.S. 1, 7-10 (1989); *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981); *Terry* v. *Ohio*, 392 U.S. 1, 27-28 (1968). Even wholly innocent conduct, viewed by a trained officer, may support a finding of reasonable suspicion. *Sokolow*, 490 U.S. at 9-10.

Here, the police officers acted within the proper scope of the traffic stop when they questioned petitioner about his itinerary and purpose. Such questions were "reasonably related to ascertaining the reasons for [petitioner's traffic violations] and whether he posed a danger to others on the road." *United States* v. *Barahona*, 990 F.2d 412, 416 (8th Cir. 1993) (officer asked a motorist where he was going and whether he was on vacation). The officers' requests for a criminal history report and a drug-sniffing dog did not extend the traffic stop any longer than was necessary to accomplish its original purpose. Both the criminal history report and the canine unit arrived within eight minutes of the initial stop of petitioner's car—less time than the officers would have required simply to write up petitioner's traffic citations. See Pet. App. 66 (the officers "would likely have taken at least 15 minutes to write [the traffic citations] up at the scene of the stop").

Moreover, based on petitioner's answers and behavior in response to Officer Chamblee's questions, the officers had reasonable suspicion to continue to detain petitioner, at least for the short time required for the drug-sniffing dog to circle the vehicle.[1] Petitioner's

---

[1] A dog sniff on property is not a search under the Fourth Amendment and thus needs no independent justification. *United States* v. *Place*, 462 U.S. 696, 707 (1983).

sudden nervousness when asked about his business in Houston and his seemingly vague, evasive, and fabricated responses to Officer Chamblee's questions gave the officers an objective basis for concluding that petitioner might have drugs or other evidence of drug crimes in the car. See, *e.g.*, *United States* v. *Withers*, 972 F.2d 837, 843 (7th Cir. 1992) (reasonable suspicion could properly be based on such factors as the defendant's nervousness, vague and inconsistent answers, and prior arrest). And once the drug-sniffing dog alerted on petitioner's car, the officers had probable cause to believe that petitioner was concealing drugs in the car. All of those events occurred within 11 minutes of the initial stop, which was well within the permissible temporal limits of an investigative detention. See, *e.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 682-688 (1985) (20-minute investigative stop of motorist was reasonable).

b. Petitioner contends (Pet. 11-14, 19-20) that the court of appeals' decision in this case conflicts "with the spirit of" *Knowles* v. *Iowa*, 119 S. Ct. 484 (1998), and "direct[ly]" with *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Florida* v. *Royer*, 460 U.S. 491 (1983) (plurality opinion), and *Reid* v. *Georgia*, 448 U.S. 438 (1980) (per curiam). Petitioner is mistaken.

In *Knowles*, the Court held that the Fourth Amendment does not authorize a full search of a vehicle incident to the citation of the driver for speeding. 119 S. Ct. at 487-488 (declining to extend *United States* v. *Robinson*, 414 U.S. 218 (1973), to create a "bright-line rule" of search incident to citation). *Knowles* did not address whether, or in what circumstances, police officers may ask a motorist questions during a traffic stop relating to his travel or request a criminal history report. Nor did *Knowles* address whether police

officers may have reasonable suspicion to detain a motorist further based on his nervousness and his seemingly vague, evasive, and fabricated answers to the officers' questions. Finally, the search of the car in this case, unlike the search in *Knowles*, took place after the officers acquired probable cause to believe that a drug violation was taking place. It was not based on the traffic citations alone.

In *Terry*, the Court stated, as petitioner notes (Pet. 13), that an investigative detention must be "justified at its inception" by at least reasonable suspicion on the part of a law-enforcement officer and must be "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20. And in *Royer*, the plurality stated, as petitioner notes (Pet. 13), that an investigative stop must "last no longer than is necessary to effectuate the purpose of the stop." 460 U.S. at 500. The court of appeals recognized and applied those principles in this case, considering whether the officers were justified at the outset in stopping petitioner for traffic offenses, whether the officers' questioning of petitioner was reasonably related to the purpose of a traffic stop, and whether the officers subsequently developed reasonable suspicion to detain petitioner to investigate additional offenses. See Pet. App. 8-11.

In *Reid*, the Court addressed whether a law-enforcement officer had reasonable suspicion to stop two men for investigation at an airport based largely on factors common to "a very large category of presumably innocent travelers." 448 U.S. at 441. That is not what occurred here. The police officers had reasonable suspicion to stop petitioner because he had committed two traffic offenses in their presence. Moreover, even if the officers detained petitioner beyond the time

required by the initial traffic stop (which, as discussed above, they did not), the officers by that time had reasonable suspicion to investigate petitioner for other offenses, which was based not on factors common to "a very large category of presumably innocent travelers," but on petitioner's specific behavior (*i.e.*, nervous, evasive, and seemingly fabricated responses to questions about the purpose of his travel) and, shortly thereafter, on petitioner's arrest record.

c. Petitioner next contends (Pet. 14) that the decision below is in "direct conflict" with various decisions of other circuits. Again, petitioner is mistaken. In this case and in the assertedly conflicting cases cited by petitioner, the courts of appeals applied the same settled legal standards, as articulated in *Terry* and its progeny, to unique factual scenarios. That the courts reached different results on different facts does not demonstrate the existence of any circuit conflict.[2] As this Court has recognized, the question whether any particular investigative detention was justified by reasonable suspicion is highly fact-specific. See, *e.g.*, *Ornelas*, 517 U.S. at 698 ("one determination [of reasonable suspicion] will seldom be useful 'precedent' for another"); *Terry*, 392 U.S. at 15 ("[n]o judicial opinion can comprehend the protean variety of the street

---

[2] Although petitioner claims (Pet. 14) a "direct conflict" with *United States* v. *Gonzalez-Lerma*, 14 F.3d 1479 (10th Cir.), cert. denied, 511 U.S. 1095 (1994), the court of appeals held in that case that the officers had reasonable suspicion to detain the defendant for investigation unrelated to the initial traffic stop. See *id.* at 1483-1484. In *Gonzalez-Lerma*, moreover, the court of appeals recognized that the officers could permissibly question a motorist, incident to the initial traffic stop, concerning the reason for his travels and the identity of the employer whose truck he was supposedly driving. See *id.* at 1483.

encounter, and we can only judge the facts of the case before us").

For example, *United States* v. *Pruitt*, 174 F.3d 1215 (11th Cir. 1999), the case principally relied on by petitioner (Pet. 15), involved facts unlike those here. In *Pruitt*, after stopping a vehicle for a traffic violation and asking the driver for his registration and insurance papers, the officer questioned the driver and his passengers at length about matters unrelated to the traffic violation, including the driver's occupation, the price of the vehicle, whether a passenger was related to the driver, and why the passenger and the driver had different last names. 174 F.3d at 1217-1218, 1221. The officer then detained the driver and the passengers, without any articulated grounds for suspecting them of illegal activity, for "nearly one-half hour" until a drug-sniffing dog arrived. *Id.* at 1218. *Pruitt* is distinguishable from the present case in at least three respects. First, in contrast to the officer in *Pruitt*, Officer Chamblee asked petitioner questions that were related to the purpose of the traffic stop. Second, in contrast to the officer in *Pruitt*, Officer Chamblee developed reasonable suspicion while investigating the traffic offenses that petitioner was engaged in other illegal activity. Third, petitioner was detained only eight minutes—less than one-third as long as the defendants in *Pruitt*—awaiting the arrival of the drug-sniffing dog and the criminal history check.[3] The Eleventh Circuit's decision in *Pruitt* was based on its perception of the detention as a "lengthy" one, 174 F.3d at 1221, a perception

---

[3] The Eleventh Circuit was also concerned in *Pruitt* that the defendants may have been singled out because they were Hispanic, see 174 F.3d at 1221, a concern that is not present in this case.

that would be particularly unwarranted with respect to the detention in this case.[4]

Petitioner further claims (Pet. 20-22) that the decision below conflicts with "a number of circuit court decisions," of which he cites only two Tenth Circuit cases, "restricting the use of the common characteristic of nervousness to justify detention." The Tenth Circuit, consistent with the Sixth Circuit in this case, recognizes that an individual's nervousness may be taken into account as part of the totality of circumstances bearing on whether officers had reasonable suspicion to detain him for further investigation. See *United States* v. *Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) (observing that "a person's nervous behavior may be relevant" but "must be treated with caution") (quoting *United States*

---

[4] The other cases relied on by petitioner (see Pet. 15-16) are also distinguishable on their facts. In *United States* v. *Walker*, 933 F.2d 812, 814 (10th Cir. 1991), cert. denied, 502 U.S. 1093 (1992), for example, the court of appeals held that the officer had unreasonably detained the defendant motorist by asking him "a number of specific questions unrelated to the traffic stop." The court also acknowledged that "our determination that the defendant was unlawfully detained might be different if the questioning by the officer did not delay the stop beyond the measure of time necessary to issue a citation," *id.* at 816 n.2, as was the case here.

In *Karnes* v. *Skrutski*, 62 F.3d 485, 497 (3d Cir. 1995), the officers had detained the motorist for two and one-half hours after the initial traffic stop—most of which the court of appeals attributed to the officers' "dilatory pursuit of their investigation" into whether the motorist possessed drugs. The court did not definitively decide in *Karnes* whether the officers had reasonable suspicion to detain the motorist for *any* period of time beyond that necessary to issue a traffic citation. It simply held that the district court erred in resolving the issue as a matter of law in favor of the officers in a civil-rights action brought by the motorist. See *id.* at 494.

v. *Peters*, 10 F.3d 1517, 1521 (10th Cir. 1993), and *United States* v. *Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992)); accord *Royer*, 460 U.S. at 493 n.2, 502 (plurality opinion) (officers had reasonable suspicion to detain a traveler based on an array of factors that included his visible nervousness); *id.* at 518 (Blackmun, J., dissenting); *id.* at 523-524 (Rehnquist, J., dissenting).[5] While the Tenth Circuit has said that nervousness alone ordinarily cannot establish reasonable suspicion, see *Fernandez*, 18 F.3d at 880, so did the Sixth Circuit in this case. See Pet. App. 11 (explaining that, although "[a]n officer could not build reasonable articulable suspicion on any one of these factors alone," such as petitioner's nervousness, "[c]ollectively, however, they suffice"). No conflict thus exists between the Tenth Circuit and the Sixth Circuit on the role of nervousness in the reasonable suspicion analysis.[6]

---

[5] In *United States* v. *Bloom*, 975 F.2d 1447, 1458 (10th Cir. 1992), another case cited by petitioner, the court of appeals explained that an individual's general nervousness during an encounter with law-enforcement officers may not be very probative, where the officers did not have "any prior knowledge of [the individual]" that would enable them to know whether he "was acting nervous and excited or whether he was merely acting in his normal manner." The present case, however, does not involve general nervousness, but rather petitioner's particularized nervousness that suddenly manifested itself when he was asked about his business.

[6] Petitioner cites (Pet. 22) two other cases—*United States* v. *Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir. 1994), and *United States* v. *Wood*, 106 F.3d 942 (10th Cir. 1997)—for the proposition that only those "factors [that] point to particularized criminal activity" may be used in the determination of reasonable suspicion. As this Court has recognized, however, factors "quite consistent with innocent [activity]," when "taken together," may "amount to reasonable suspicion." *Sokolow*, 490 U.S. at 9. The Ninth and Tenth

2. Petitioner also contends (Pet. 23-29) that the indictment was constructively amended by evidence that he trafficked in marijuana as well as cocaine. That claim is fact-bound and, for that reason alone, does not warrant the Court's review. In any event, the claim is without merit.

An indictment is constructively amended when the proof at trial or the jury instructions permit the jury to find the defendant guilty of an offense not charged in the indictment. See *Schmuck* v. *United States*, 489 U.S. 705, 717-718 (1989); *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). The admission of the marijuana evidence in this case did not constructively amend the indictment. The evidence of petitioner's marijuana dealing, which often occurred at the same time and with the same buyer as petitioner's cocaine dealing (see Pet. App. 25; Gov't C.A. Br. 24), was properly admitted for the limited purpose of showing the existence and scope of the charged cocaine trafficking conspiracy and petitioner's role in it. The district court carefully instructed the jury on the limited purpose for which the evidence was admitted, explaining that "[t]he only reason we're allowing this testimony concerning the marijuana is so that it will make better sense to you all about what was going on," and cautioning that "these men are not charged with marijuana and don't let that influence you in connection with the claim that they're

---

Circuits do not disagree. See *United States* v. *Rodriguez*, 976 F.2d 592, 596 (1992) ("factors consistent with innocent travel might, when taken together, amount to reasonable suspicion"), amended, 997 F.2d 1306 (9th Cir. 1993); *Wood*, 106 F.3d at 948 ("the nature of the totality of the circumstances test makes it possible for individually innocuous factors to add up to reasonable suspicion"); cf. *Rodriguez-Sanchez*, 23 F.3d at 1492-1493 (case cited by petitioner sustaining investigatory detention based on reasonable suspicion).

dealing in cocaine." Gov't C.A. Br. 24-25.[7] The jury must be presumed to have followed the court's instruction. *Jones* v. *United States*, 119 S. Ct. 2090, 2105 (1999). Especially in light of that instruction, petitioner was not at risk of being convicted of a crime different from the one charged in the indictment. See *United States* v. *Mitchell*, 64 F.3d 1105, 1111-1112 (7th Cir. 1995) (admission of evidence that the defendant possessed heroin did not constructively amend the indictment charging the defendant with possession of marijuana and cocaine, where a jury instruction limited the charges to those in the indictment), cert. denied, 517 U.S. 1158 (1996); accord, *e.g.*, *United States* v. *Johnson*, 934 F.2d 936, 941-942 (8th Cir. 1991); *United States* v. *O'Connor*, 737 F.2d 814, 821-822 (9th Cir. 1984), cert. denied, 469 U.S. 1218 (1985).[8]

---

[7] The complete instruction given by the district court, at petitioner's request, was the following:

> Members of the jury, remember that these defendants are not charged with trafficking or conspiring to traffic[] in marijuana, but only cocaine. The only reason we're allowing this testimony concerning the marijuana is so that it will make better sense to you all about what was going on.
>
> But remember these men are not charged with marijuana and don't let that influence you in connection with the claim that they're dealing in cocaine. Now, it's cocaine is the charge here. Is that sufficient?

Gov't C.A. Br. 24-25.

[8] Contrary to petitioner's assertion (Pet. 25-26), the decision below is not inconsistent on the constructive amendment issue with *United States* v. *Glenn*, 828 F.2d 855 (1st Cir. 1987). In *Glenn*, although the indictment charged the defendants with conspiracy to import and possess marijuana from Thailand and hashish from Pakistan, the evidence established only that one defendant participated in a marijuana conspiracy and the other

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
THOMAS E. BOOTH
Attorney

SEPTEMBER 1999

---

participated in a hashish conspiracy. See *id.* at 858-859. Here, by contrast, there was no variance between the indictment and the proof. As the court of appeals recognized (Pet. App. 21), the evidence at trial established, consistent with the indictment, that petitioner participated in a conspiracy to distribute cocaine. In addition, the jury instruction ensured that petitioner would not be convicted of an uncharged marijuana offense.